

# RESERVED WATER RIGHTS COMPACT COMMISSION



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June 26 2014

Mr. Ron Trahan  
Chairman, Confederated Salish & Kootenai Tribes  
P.O. Box 278  
Pablo, MT 59855

Dear Chairman Trahan,

Please find enclosed a proposed outline for negotiations concerning water use on the Flathead Indian Irrigation Project (FIIP). Pursuant to your previous correspondence with Governor Bullock, this limited reopening of negotiations will address issues pertaining to the allocation of FIIP irrigation rights and fisheries instream flows affecting the project and will involve the Tribes, the State of Montana, and the United States as negotiating parties. The Governor and Commission remain committed to all other provisions of the proposed Compact and Unitary Management Ordinance as they were negotiated. Those documents required the good faith efforts of all parties to achieve an equitable balancing of the Tribes' substantial water rights claims with protections for existing water users.

The enclosed proposal reflects the State's newly assumed role as a negotiating party concerning the FIIP rights. The Commission remains committed to representing the interests of state-based water users in negotiations, but has a fundamentally different scope of authority than does the Flathead Joint Board of Control. For this reason the proposal represents a more general approach than that taken when the FJBC was a party to negotiations. The Commission is of the opinion that this approach is more consistent with its authority and its prior tribal settlements than the highly specific operational plan contained in the Water Use Agreement. The Commission hopes that the Tribes, Irrigation Districts, and Bureau of Indian Affairs will resume productive discussions concerning project operations.

The Commission recognizes and appreciates the substantial technical work completed by the Tribes that formed the basis for the allocations of water stipulated in the Water Use Agreement. The Commission is confident that much of this work is highly relevant to the approach outlined in the proposal and that it will be fundamental to any settlement ultimately agreed to by the parties. Because the Commission was not a party to the initial negotiation, however, it respectfully requests the opportunity to complete and submit to the Tribes a more thorough review of the FIIP allocations negotiated between the Tribes, the United States, and the FJBC. We anticipate that this review and any resulting analyses or recommendations will be distributed by July 1.

Finally, please understand that this proposal represents the State's suggested framework for negotiations. The State is but one party to these discussions and welcomes any suggested amendments or counter-proposals from the Tribes and United States. We look forward to a productive and

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CSKT Technical Working Group

meaningful discussion. With the short time available to for resolution of these issues prior to the 2015 legislative session in mind, the Commission proposes an initial negotiation session during the first week of July, with a goal of completing negotiations by September 15, 2014.

Sincerely,



Chris D. Tweeten

Chairman, Montana Reserved Water Rights Compact Commission

C: Rhonda Swaney, Duane Mecham, Ed Sheets

## **The State of Montana's Proposal for Limited Reopening of Negotiations**

Governor Bullock and Confederated Salish and Kootenai Tribal Chairman Trahan have established an agreement between parties to engage in a limited reopening of negotiations to resolve outstanding issues pertaining to the Proposed Water Rights Compact between the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States. As noted in the Governor's letter dated March 31, 2014, the dissolution of the Flathead Joint Board of Control (FJBC) and the reassumption of project operations by the Bureau of Indian Affairs (BIA) renders void the Water Use Agreement (WUA) previously negotiated between the Tribes, United States, and Flathead Joint Board of Control and attached as an appendix to the Compact. In pursuance of the Governor's letter, the Montana Reserved Water Rights Compact Commission presents to the tribes the following proposed outline for negotiations to resolve the issues created by these events.

The Commission's goal in this limited reopening of negotiations is to ensure that irrigation deliveries are protected while water savings achieved through Compact-associated project improvements are directed towards Tribal instream flow water rights. The Commission believes that these objectives are consistent with the premise that motivated negotiations between the Tribes, the United States, and the FJBC. As the State is now a party to the negotiations over the issues covered by the former WUA, the Commission envisions and would like to propose a somewhat different approach than that taken previously.

This approach will make use of the extensive body of technical work underlying the WUA in order to establish the relationships between project headworks diversions and Tribal instream flow rights, while leaving the more detailed operational issues to the operators and users of the project water rights. The proposal also seeks to emphasize the importance of settlement-funded measurement verification in order to provide increased protection for both irrigation deliveries and Tribal instream flows. While the Commission believes that the approach outlined below is consistent with its other compact negotiations and honors agreements made by the parties during prior negotiations relating to this settlement, it should be emphasized that this document represents only the State's proposed vision for a negotiation framework. The Commission understands that it is one of three parties, and anticipates that both the Tribes and Federal Government will respond with suggested modifications and/or counter-proposals.

- I. **General provisions:** The following provisions represent the Commission's understanding of the parameters that will govern negotiations between the parties. This understanding is based on the letters exchanged between Governor Bullock and Chairman Trahan.
  - A. **Negotiating parties:** As required by State law, the Commission will represent the Governor in negotiations. The Commission will negotiate as a party on behalf of state-based water users, both on and off the project, to conclude Compact provisions relating to the Flathead Indian Irrigation Project (FIIP) water right, protections for project headwork diversions, and Tribal instream flow protections affected by project diversions.
  - B. **FIIP irrigator input:** The State will solicit input from the irrigation districts and Flathead Joint Board of Control during the negotiation process. Nothing to be resolved in this negotiation precludes the irrigation districts from working directly with the Tribes and BIA to negotiate an operations plan for the project, and the State encourages the parties to work together to develop such a plan.

C. **Limited reopening of negotiations:** Negotiations will be reopened for the limited purposes of 1) protecting historic consumptive use by irrigators; 2) balancing irrigation deliveries with tribal instream flow needs quantified by the Compact; and 3) providing for rehabilitation and betterment of project infrastructure and mechanisms for on-farm efficiencies through use of federal and State contributions to settlement. The State will not negotiate specific policies for internal project deliveries, and the Compact will not include a FIIP operations plan. As noted above, the State will encourage the irrigation districts to work with the Tribes and BIA to cooperatively develop an operations plan.

i. **State Technical Review:** The Commission understands that the comprehensive technical work used to formulate the HYDROSS model is pivotal to creating a framework for allocating water between instream and irrigation uses on the FIIP. As the State was not a party to that negotiation, however, the Commission's technical staff requests the opportunity to complete a more thorough review of the FIIP water right quantifications negotiated between the Tribes, the United States, and the FJBC. Commission staff will complete this review and share any concerns or requests with the parties by July 1, 2014.

D. **Negotiations:** Technical details of the State's proposal and the parties' responses will be reviewed in legal-technical meetings. Negotiations on the State's proposal will be conducted in a public setting and with the opportunity for public comment. Negotiations will be conducted in accordance with strict guidelines as to the parameters and time limits of public comment and will be modeled on the meeting guidelines used by the Interagency Bison Management Plan or a similar format. The State proposes that a facilitator be employed to conduct negotiation sessions. If all parties are amenable, they will mutually agree on a facilitator and will share associated costs.

II. **Water rights and measurement:** The following are fundamental components of the settlement that were resolved by the former WUA. The Commission proposes using these provisions as a starting point for negotiations with the following refinements:

A. **Enforceable Hydrographs:** The State proposes an agreement in which the Tribe's instream fisheries water rights that affect FIIP deliveries will be enforced through minimum enforceable flows (MEFs) similar to those set forth in the former WUA Appendix A1. The State proposes shifting from monthly block MEF values set forth in the former WUA to Enforceable Hydrographs (EH) based on similar, but not identical, methodologies to those used in the State's off-Reservation proposal. Forecasting may be an option for setting delivery levels that accurately reflect year-to-year water supplies, but the State would like such forecasting to reflect finer degrees of supply assessment than the seasonally-based time-intervals of wet, average, and dry year values set forth in the former WUA, which do not address important within-season water supply considerations.

B. **River Diversion Allowances:** The State proposes an agreement in which the Tribe's water right set forth to serve the FIIP will be enforced through River Diversion Allowances (RDAs), that will be sufficient to serve historic levels of irrigation with the application of settlement funded efficiency, infrastructure, and management improvements that allow senior tribal fisheries instream flows to be satisfied.

- C. **Deferral:** MEF values, which will be senior in priority to FIIP RDAs, will incorporate a multi-year ramping of annual MEF values in a manner that will allow project infrastructure and management improvements to take effect and reduce diversion demands. Those timeframes will reflect the deferral periods found in the former WUA Section XVII.
  - D. **MEF deferral period measurement verification:** The State proposes water measurement during the MEF deferral period for verification of MEF and FIIP diversion values in a way that enables correction of enforceable base values set forth in the Compact. The State proposes that the Tribes will conduct these measurements according to the terms of the Compact and that the measurements will be made available to the public and irrigation communities.
  - E. **Mandatory water measurement:** The State proposes settlement-driven investment in water measurement and accounting infrastructure for purposes of measuring MEF and FIIP headworks diversions.
  - F. **FIIP minimum pool levels:** The State will continue to support minimum reservoir pool levels for FIIP reservoirs similar to those found in the former WUA Appendix A2, but will solicit irrigator input as to the values set forth in the former WUA and any proposal for negotiated changes to those values.
  - G. **Allocations between MEFs and RDAs:** The State proposes that an accounting mechanism be set forth that enables flexible deliveries and MEF enforcement, tracking allocations in a way that allows project operators to adjust delivery amounts within set thresholds to satisfy competing allocations in a practical and reasonable manner. In the absence of such an accounting mechanism, MEFs will be honored at face-value flow rate quantifications.
  - H. **FIIP Delivery Rights:** The State will propose Compact language that affirms that irrigators have a right to delivery of water from the FIIP that runs with the land and that must be used for irrigation and irrigator supplied incidental uses. The right will operate in accordance with current federal law. The Compact will provide a mechanism for resolution of disputes among individual irrigators consistent with the language in WUA Article XXVI.
- III. **Project improvements and cost-sharing:** The State understands that project infrastructure upgrades are an integral part of achieving increased instream flows while protecting irrigation deliveries. The State remains committed to the efficiency upgrades and contributions to settlement outlined in the 2013 legislation and proposes the following modifications and additions:
- A. **On-farm efficiency upgrade cost-sharing:** The State will promote on-farm water measurement and efficiency upgrades, including but not limited to piping/lining of lateral canals and sprinkler conversion on lands privately owned and located within the FIIP and FIIP-influence area through cost-share programs at an amount equal to the 2013 HB0629 Fiscal Note (\$4 million); the State will encourage the federal government

to commit to similar cost-sharing with federal funds. The State will implement cost-sharing programs through existing State programs such as Department of Natural Resources and Conservation - Conservation and Resource Development Division (DNRC - CARDD).

- B. **Water measurement and management cost-sharing:** The State will commit to cost-sharing with the Tribes and the Federal government of a deferral period water measurement program in an amount as set forth in the 2013 HB0629 Fiscal Note (\$4 million).
- C. **Stock water:** The State will provide a cost-share fund for alternative stock water developments in the amount set forth in the 2013 HB0629 Fiscal Note (\$4 million).
- D. **Pumping fund:** The State will provide a fund for pumping water from Flathead Lake or the mainstem of the Flathead River in an amount set forth in the 2013 HB0629 Fiscal Note (\$30 million). The State proposes adequate diversion allowances at the pumping plant for increasing water supplies through pumping. The State will request a continuation of the Tribes' previously negotiated commitment to provide a low-cost block of power for purposes of supplying electricity to pumps that serve this water supply.
- E. **Tribal habitat enhancement fund:** The State will continue to support a fund for Tribal aquatic and terrestrial habitat enhancement in the amount set forth in the 2013 HB0629 Fiscal Note (\$13 million).
- F. **FIIP upgrades:** The State promotes federally supported and funded FIIP upgrades including the following, which are not necessarily in order of priority:
  - i. FIIP served land redesignation.
  - ii. FIIP incorporation of an alternative water accounting database and water accounting system.
  - iii. FIIP incorporation of farm-turnout measurement and recording.
  - iv. Larger FIIP infrastructure upgrades as set forth in former WUA Appendix C.

**IV. Other provisions:**

- A. **Protections for non-project irrigators within the project influence area:** The State will revise non-project irrigator consensual agreements to instead allow for a project quota or equivalent in place of the Farm Turnout Allowance value.
- B. **Saved Water:** The State suggests that water saved through betterment should be technically estimated and added to MEFs. RDAs will be static but must accommodate senior MEF values as their phase-in occurs. Saved water will include a water measurement validation process to ensure technical estimations of saved water are accurate and not less than estimated. Saved water shall be reallocated in a fashion similar to that set forth in the former WUA Section XVIII.

- C. FIIP delivery disputes: FIIP delivery disputes will be resolved in accordance with the delivery dispute provisions at Article XXVI of the former WUA.
- D. Adjudication of competing claims: The State's position is that competing state-based claims that have been filed in the statewide general stream adjudication for waters supplied either through FIIP or other sources will proceed through the Montana Water Court. Should any of those water rights be deemed valid as examined and decreed they will be administered according to the rule of prior appropriation.
- E. Secretarial Water Rights: The State's position is that Secretarial Water Rights are not the subject of this water right negotiation and accordingly will not be specifically addressed.